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IN THE

Supreme Court of the United States

October Term, 1969

No. 305

UNITED STATES OF AMERICA,
Appellant,

v.

JOHN HEFFRON SISSON, JR.,
Appellee.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF FOR THE AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE*

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Interest of the *Amicus*

The American Jewish Committee was incorporated by Act of the Legislature of the State of New York in 1911. Although the chief reason for being of this organization is to prevent the infraction of the civil and religious rights of Jews, the American Jewish Committee has from its very inception been devoted to the attainment of civil and religious liberty for all Americans. In *Pierce* v. *Society of Sisters of the Holy Name,* 268 U. S. 510 (1925), for exam-

ple, we urged this Court to invalidate the anti-parochial school law which had been enacted by the State of Oregon. The rationale for this broad-gauged approach has been our conviction that Jews will be most free and most secure in a society in which freedom and security are assured to citizens of all faiths—as well as of none. The *amicus* agrees with the late Mr. Justice Jackson who said that the "day that this country ceases to be free for irreligion, it will cease to be free for religion—except for the sect that can win political power." *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952).

While the constituency of the American Jewish Committee includes large numbers of people who worship God devoutly, this *amicus* does not subscribe to the view that government may accord preferential treatment to religious believers or discriminate in any manner against non-believers. To the contrary, it is our view that the constitutional principle of separation of church and state, which is adumbrated in the Establishment Clause of the First Amendment, mandates strict neutrality on the part of government as between religion and irreligion. Above all, we believe that freedom of conscience is sacrosanct.

Yet the Military Selective Service Act of 1967, §6(j) as amended 50 U.S.C.A. App. §456(j), which limits exemption from combat training and service to one "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," clearly does accord preferential treatment to religious pacifists, as distinguished from non-religious pacifists. It is for this reason alone that the American Jewish Committee files this brief *amicus curiae* with the consent of the parties.

Opinion Below

The opinion of the United States District Court for the District of Massachusetts is reported at 297 F. Supp. 902.

Jurisdiction

On April 1, 1969, the District Court entered an order granting the appellee's motion in arrest of judgment on the ground that the statute in question (50 U.S.C. App. 462), which makes it a crime to refuse to submit to induction as ordered, could not constitutionally be applied to appellee. A notice of appeal to this Court was filed on April 23, 1969. 18 U.S.C. 3731 confers jurisdiction upon this Court to review on direct appeal a decision granting a motion in arrest of judgment on the ground that the statute on which the indictment is based is invalid.

Question Presented

This brief is addressed solely to the narrow issue of whether the Military Selective Service Act of 1967, 50 U.S.C. App. §§451 et seq. (hereinafter sometimes referred to as the "Act"), when it is applied to compel military service by non-religious conscientious objectors but not by religious conscientious objectors, violates the mandate of the First Amendment that "Congress shall make no law respecting an establishment of religion, * * *", as well as the requirement of the Fifth Amendment that "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *"

Statute Involved

Section 4(a) of the Act, 50 U.S.C. App. §454(a) provides in pertinent part:

> "The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States * * * such number of persons as may be required to provide and maintain the strength of the Armed Forces * * *"

Section 6(j) of the Act, 50 U.S.C. App. §456(j) provides in pertinent part:

> "Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code * * *"

Section 12(a) of the Act, 50 U.S.C. App. §462(a), provides in pertinent part:

> "Any * * * person charged as herein provided with the duty of carrying out any of the provisions of this title * * * or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both * * *"

Statement of the Case

The facts in the case are not in dispute. John Heffron Sisson, Jr. received an order from Local Board 114, Middlesex County, Massachusetts, to report for induction into the armed forces on April 17, 1968. Subsequently, although Sisson did report to the Boston induction center, he refused to accept induction.

Prior to this occurrence, on February 29, 1968, Sisson had written to his draft board, indicating that he was conscientiously opposed to military service and requesting the appropriate form to make claim for exempt status. However, upon receiving this form, Sisson did not execute it because he concluded that he was not entitled to exemption since his objection to military service was not a religious one. Rather it was rooted in his general moral, ethical and educational development over the years and, more immediately, in his particular perception that he could not in good conscience obey an order to serve in the war in Vietnam, which he deemed to be an illegal and immoral war. Sisson's sincerity is not in issue.

On March 21, 1969, a U.S. District Court jury in Boston returned a verdict that Sisson was guilty of unlawfully refusing to submit to induction, in violation of the Military Selective Service Act of 1967. Shortly thereafter Sisson filed a motion in arrest of judgment, *inter alia,* on First Amendment grounds. On April 1, 1969, Judge Charles E. Wyzanski, Jr. issued an order granting Sisson's motion, holding that the Act violates the "non-establishment" clause by discriminating between religious and nonreligious

conscientious objectors and violates the "free exercise" clause by compelling a conscientious objector to fight in an undeclared foreign war. The District Court rejected Sisson's contentions that Congress has no power to draft a conscientious objector, whether in time of peace or in time of war, that Congress has no power to conscript anyone during peace time, and that the District Court can have no jurisdiction of the offense charged if the legality of the Vietnam war is a political question. The District Court based its decision arresting the judgment of conviction for insufficiency of the indictment "upon the invalidity * * * of the statute upon which the indictment * * * is founded," within the meaning of this phrase as used in 18 U.S.C. §3731. On October 13, 1969, this Court noted probable jurisdiction.

Summary of Argument

Today it is beyond dispute that the Establishment Clause of the First Amendment not only forbids government to aid religion, but also requires government to be neutral as between religion and non-religion. The truth of this proposition is attested to by a long line of case decisions which have emanated from this Court. The question arises, however, as to what constitutes aid to religion and as to when the mandate of governmental neutrality is flouted. This becomes a question of fact in any given situation.

Section 6(j) of the Military Selective Service Act of 1967 permits exemption from military service to persons who are opposed to war by reason of "religious training

and belief." It expressly excludes from the scope of these terms such views as are "essentially political, sociological, or philosophical." It excludes also a "personal moral code." In the common understanding of the language used in Section 6(j), the law accords a preference to religious pacifists. This, we maintain, represents aid to religion and is a manifest departure from the requirement that government be neutral as between religion and non-religion.

Aid to religion, in violation of constitutional stricture, cannot be justified on the ground of administrative convenience. Moreover, by no means has it been proven that a religious test for conscientious objectors actually is a more efficacious one than a different kind of test. The problem of the sincerity of an applicant must be resolved in each instance, regardless of the nature of the criteria for exemption. Assuming that exemption for conscientious objectors is a matter of legislative grace, rather than of right, such a privilege may not be extended in a manner which violates the Constitution.

To construe "religious training and belief" so broadly as to embrace an avowed agnostic, in the interest of upholding the constitutionality of the law, would tend to make the word "religious" virtually meaningless. If everything is "religious," then nothing is "religious." To render to "religious training and belief" the meaning which these terms truly deserve, thus excluding agnosticism or atheism, perforce must lead to the conclusion that this test is an unconstitutional one.

The Due Process Clause of the Fifth Amendment has been interpreted by this Court so as to prohibit unjustified

discrimination. Statutes which discriminate arbitrarily and unreasonably have been invalidated as being violative of the "equal protection" principle, which has been construed to be implicit in the Due Process Clause.

Clearly, Section 6(j) treats religious conscientious objectors differently than it treats non-religious conscientious objectors. Unless it can be shown that there is a constitutionally permissible basis for such a discrimination, this provision cannot stand. It is our contention that the Government has failed to demonstrate either the necessity, the fairness or the rationality of the existing criteria for exemption from military service.

ARGUMENT

POINT I

The Military Selective Service Act of 1967, to the extent that it limits exemption from combat service to those who are opposed to war "by reason of religious training and belief," discriminates against non-religious objectors and therefore violates the Establishment Clause of the First Amendment to the United States Constitution.

The First Amendment to the United States Constitution provides, in part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"

The definitive exposition of the meaning of the Establishment Clause was articulated by this Court in *Everson*

v. Board of Education, 330 U.S. 1 (1947) in the following terms:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions,* or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' " *Id.,* at 15-16. (emphasis added)

Both the majority and minority in *Everson* agreed in substance upon that definition. This Court noted such agreement in *McCollum* v. *Board of Education,* 333 U.S. 203, 210-211 (1948), and in *Torcaso* v. *Watkins,* 367 U.S. 488, 492-493 (1961) which upheld the right of a non-believer to hold public office. Whether or not that definition of the Establishment Clause was dictum in *Everson,* it indisputably became the *ratio decidendi* in *McCollum,* as acknowledged by this Court's opinion in *Torcaso.* That definition of establishment was reaffirmed in the opinion of the Chief Justice in *McGowan* v. *Maryland,* 366 U.S. 420,

443 (1961), and by the unanimous opinion of this Court in *Torcaso, supra,* at 492-3.

More recently, this Court, in the unanimous decision which declared unconstitutional an Arkansas law prohibiting the teaching of the doctrine of evolution in public schools, stated:

> "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion." *Epperson* v. *Arkansas,* 393 U.S. 97, 103-4 (1968).

Measured against these interpretations, it is difficult to perceive how Section 6(j) of the Act can withstand challenge under the Establishment Clause. Clearly this provision, whatever its rationale, permits the granting by government of a privileged status to religious believers which is denied to non-believers. We need not labor the point. The fact that Section 6(j) does aid religions is virtually a matter of *res ipsa loquitur.* It is no answer to this palpable constitutional infirmity to contend, as the Government does, that such a distinction is warranted because it "provided a manageable, tangible test susceptible of administrative and judicial application." (Jurisdictional Statement, p. 15). This argument amounts to an attempt to rationalize a triumph of expediency over constitutionality. But administrative convenience, in and of itself, is not adequate support for infringement of a constitutional

right. *Harrell* v. *Tobriner*, 279 F. Supp. 22, 30 (D.C. District of Columbia, 1967). As a matter of fact, it is even doubtful whether a religious conscientious objector test really is easier to apply. In both types of cases, religious and non-religious, draft boards must determine the sincerity of the applicants. A religious claimant has the comfort of accepted dogma and precedent to sustain him. His non-religious brother may have to pick his own way through uncharted waters. An insincere person seeking to avoid military service might find it easier to rest his exemption claim on a well-rehearsed religious base than on a non-religious one, assuming both courses were open to him.

We express no opinion as to whether Congress is constitutionally required to exempt conscientious objectors from military service. But we maintain that Congress, having determined to grant such an exemption, may not constitutionally require "religious training and belief" as the entrance charge for exemption. It has been said that granting exemptions to conscientious objectors is a matter of legislative grace. *Cannon* v. *U.S.*, 181 F. 2d 354 (9th Cir. 1950); *Hamilton* v. *Regents of University of California*, 293 U.S. 245, 246 (1934). Assuming that to be true, it by no means follows that such grace may be applied in an unconstitutional manner. *Speiser* v. *Randall*, 357 U.S. 513 (1958). From a First Amendment point of view, it is no more proper to base conscientious objector exemption on "religious training and belief" than it would be to limit such exemption only to members of the Mennonite Church, for example. The former favors religion generally, while the latter would favor a particular sect. Both, we submit, are equally prohibited by the Establishment Clause.

The Government maintains also that Section 6(j) does not violate the Establishment Clause because the wording of this provision does not reflect a congressional preference or prejudice for religion, but rather a judgment that religious conscientious objectors hold beliefs which are qualitatively different from those held by non-religious conscientious objectors. We believe that this argument, even if it were true, is essentially irrelevant since the touchstone of constitutionality is not necessarily wording or legislative intent, but rather the practical effect of the statute in question (*Terry* v. *Adams*, 345 U.S. 461 (1953)) which, in the case of Section 6(j), is to confer a benefit upon religion. Moreover, it is generally recognized that the objections to war of a non-religious conscientious objector may be as deeply felt and as sincerely held as those of one who is religiously motivated. In any event, the sincerity of the applicant is one of the principal problems that draft boards and courts must resolve in these cases, even under the present language of the statute.

Does Section 6(j) of the Act contravene the Establishment Clause? That question was left undecided by this Court in *U.S.* v. *Seeger*, 380 U.S. 163 (1965). In *Seeger*, the Court found it unnecessary to reach the issue of constitutionality because of its broad construction of the language in question.[1] We believe, however, that to stretch "religious training and belief" to encompass the philosophy of the appellee in this case, who is an avowed agnostic,

1. In an article entitled "Defining Religion: Of God, the Constitution and the D.A.R.", 32 University of Chicago Law Review 539, Spring 1965, Robert M. Berger observes "If one reads between the lines, *Seeger* is further authority that nontheism cannot be excluded from a constitutionally permissible definition of religion."

would improperly distort the plain meaning of words. The question above deserves to be answered in the affirmative, irrespective of whether or not Sisson is entitled to exemption as an objector to participation in the Vietnam conflict.

POINT II

The Military Selective Service Act of 1967, to the extent that it limits exemption from combat service to those who are opposed to war "by reason of religious training and belief," discriminates against non-religious objectors and therefore is an arbitrary and unreasonable classification which violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

Initially, conscientious objector status was granted only to members of pacifist sects. This was broadened in 1940 to include claimants whose opposition to war was based on "religious training and belief." *U.S.* v. *Seeger, supra,* at 171. In *Seeger,* it was broadened to encompass informal and unorthodox "religious" beliefs, developed outside of formal religion based, in part at least, on philosophical writings, for instance, "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed" (*Ibid.,* p. 166).

The limitation of conscientious objector status to those whose objections arose by reason of "religious training and belief" reflected the legislative preference for or discrimination in favor of religious persons. It is noteworthy that the reference is not merely to religious belief, but is

joined with the training requirement. This would ordinarily appear to require a formal and active participation in religious observance and educational preparation. Nevertheless, *Seeger* in effect has eliminated the content from the "religious training" element of the test. All that remains is a vague and indefinite test of sincere beliefs, perhaps with some semblance of a religious basis for these beliefs, such as a religious home or religious writings (*Seeger,* at 186). In short, some applicants for exemption may qualify, while others may not. The line of demarcation is blurred.

Such discrimination is arbitrary, unreasonable and constitutes a denial of equal protection and due process of law in violation of the Due Process Clause of the Fifth Amendment to the Constitution. See the concurring opinion of Mr. Justice Douglas in *U.S.* v. *Seeger, supra,* at 188. While the Fifth Amendment does not include an "equal protection" clause, it is clear that its Due Process Clause has been construed to bar unjustifiable discrimination. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). In *Seeger,* Mr. Justice Douglas referred to discrimination between "religions" as being an unconstitutional denial of due process. It is equally true that discrimination between persons like Seeger and Peter, whose views would not be considered "religious" in the ordinary sense of the word, and Sisson, whose views, while not self-characterized as religious, are of a religious nature (as stated by the District Court below) would be an unconstitutional denial of due process.

Is there a meaningful distinction between the views expressed by Seeger in *U.S.* v. *Seeger, supra,* at 166 or

Peter at 169, on the one hand, and those of Sisson on the other? It is very hard to find any. To say that Seeger's and Peter's views are "religious," while Sisson's are not, is to draw a distinction without a difference. While Sisson concedes that he is a non-religious conscientious objector, it is unclear wherein his beliefs differ in kind from those required under the "objective" test enunciated in Seeger:

> "* * * Does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" *U.S.* v. *Seeger, supra,* at 184.

As the District Court below pointed out:

> "Sisson * * * was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." *U.S.* v. *Sisson,* at 905.

One view of the matter was set forth quite clearly in *George* v. *U.S.,* 196 F.2d 445, 450 (9th Cir. 1952), cert. den., 344 U.S. 843 (1952) where the Court said:

> "* * * the Congress is free to determine the persons to whom it will grant [the exemption] and may deny it to persons whose opinions the Congress does not class as 'religious' in the ordinary acceptance of the word."

But this Court has recognized that discrimination may be so unjustifiable as to be violative of due process. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), dealt with racially segregated public schools in the District of Columbia. "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that

constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause'' (*Id.*, p. 500). While the discrimination involved in *Bolling* was racial, religious discrimination is equally insupportable.

Another case which is highly germane is *Schneider* v. *Rusk,* 377 U.S. 163 (1964), in which this Court held that the section of the Naturalization Act, which deprived naturalized citizens of citizenship if they returned to their country of origin for a period of three consecutive years, breached the Due Process Clause of the Fifth Amendment because no such restriction applied to native-born citizens. All of the Justices who participated in that case agreed on the principle that the Due Process Clause forbids arbitrary discrimination, the majority and the dissenters parting company only as to whether there was a reasonable basis for the discrimination at bar. Both *Bolling* and *Schneider* serve to buttress our contention that discrimination against conscientious objectors who are non-believers is an unreasonable and impermissible classification which violates the Due Process Clause of the Fifth Amendment. The Government has failed to demonstrate that the discrimination in question is necessary to the proper administration of the draft law. See *Harman* v. *Forssenius,* 380 U.S. 528 (1965). The invidious distinctions inherent in Section 6(j) of the Military Selective Service Act of 1967 are not necessary, not fair and not rational.

Conclusion

For the reasons set forth herein, the judgment of the District Court arresting the appellee's judgment of conviction should be affirmed.

Respectfully submitted,

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January, 1970